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In the
Supreme Court of the United States

October Term, 1963
No. 547

GERALD L. RATIGAN, et al.,
Appellants,

vs.

HERBERT DAVIS, et al.,
Appellees.

On Appeal from the Supreme Court of the State of Nebraska

JURISDICTIONAL STATEMENT

BENJAMIN M. WALL,
of HANEY, WALSH & WALL,
Counsel for Appellants.
610 Service Life Building
Omaha, Nebraska, 68102

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INTRODUCTION

Appellants appeal from the judgment of the Supreme Court of the State of Nebraska, entered on July 5, 1963, overruling appellants' timely motion for rehearing of the Court's judgment and opinion entered on the 7th day of June, 1963. The judgment and opinion affirmed the findings

of the District Court of Douglas County, Nebraska, sustaining the appellees' demurrer to the plaintiffs' petition. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of the State of Nebraska is reported at 175 Neb. 416, ... N. W. 2d .....
Copies of the opinion are attached hereto as Appendix A.

JURISDICTION

This suit was brought under the provisions of Sec. 25-319, R. R. S. Nebr. 1943, on behalf of all persons similarly situated to declare void and unconstitutional the levy of taxes by the University of Omaha against residents of School District 66 and School District 54 of Douglas County, Nebraska, within the City of Omaha. The jurisdiction of the Supreme Court of the United States to review this decision is conferred by Title 28, United States Code, Section 1257 (2). The following cases sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Central Railroad Company of Pennsylvania v. Commonwealth of Pennsylvania*, 370 U. S. 725, 82 S. Ct. 1297, *Marcus v. Search Warrants of Property at 104th East 10th Street, Kansas City, Missouri*, 367 U. S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127.

QUESTION PRESENTED

Where plaintiffs are duly qualified electors under the Constitution and Laws of the State of Nebraska and are denied any voice by ballot in the management and control of a public institution, may they properly be taxed for the support of such institution.

STATUTES INVOLVED

Sections 14-1304, 14-1305, 14-1317, 14-1318, 25-319 and 79-1003, R. R. S. Nebr. 1943 are set forth in Appendix B hereof.

STATEMENT

Appellants brought this action for themselves and for all other persons similarly situated in School District No. 66 of Douglas County, Nebraska, and School District No. 54 of Douglas County, Nebraska. The plaintiffs and persons similarly situated are citizens, residents and taxpayers of the City of Omaha, County of Douglas, State of Nebraska, and citizens, residents and taxpayers in School Districts Nos. 66 and 54 of Omaha, Douglas County, Nebraska, and liable for taxes assessed in those subdivisions of government. The plaintiffs are duly qualified electors under the Constitution and Laws of the State of Nebraska. The defendants Davis, Barber, Fogarty, Greenberg, Karpf, Kiewit, Kiplinger, Merriam and Rhodes are alleged to be Regents of the Municipal University of the City of Omaha. The defendant Sam J. Howell is the duly elected and acting County Treasurer of Douglas County,

Nebraska, and ex officio treasurer of the Municipal University of the City of Omaha under the provisions of Sec. 14-1318 R. R. S. Nebr. 1943. Members of the School Board of the Omaha School District were also originally named as defendants herein; however, their Demurrers on the ground that they were neither necessary nor proper parties to this action were sustained by the Trial Court and no issue was made in the Supreme Court of the State of Nebraska nor is such issue made here as to their dismissal.

During the past several years the City of Omaha, acting under its annexation authority has extended its boundaries to include portions of School District No. 66 of Douglas County, Nebraska, as well as portions of School District No. 54 of Douglas County, Nebraska, these two school districts being separate public corporations from the School District of the City of Omaha. Under the provisions of Sec. 14-1304 and 14-1305, R. R. S. Nebr. 1943, the Board of Education of the School District of the City of Omaha is given the exclusive right and power to select the Regents of the Municipal University of the City of Omaha and to fill vacancies occurring on said Board of Regents. During the period of time in which the boundaries of the School District of the City and the City of Omaha were co-terminous, this statutory provision for selection of the Board of Regents was unquestionably proper. It is only as the City's boundaries have been extended to include more than one school district within the limits of the City of Omaha that the problem herein litigated arises. No contention is made herein that the Statutes involved are unconstitutional on their face but

merely that they are unconstitutional as applied to the specific situation in which appellants and persons similarly situated find themselves. Since the appellants reside outside of the Omaha School District, even though within the boundaries of the City of Omaha, they have no opportunity to vote on the election of the members of the Board of Education of the School District of Omaha, which Board, as noted above, exercises the sole authority in selecting the Board of Regents of the Municipal University of the City of Omaha. This disenfranchisement occurs under the provisions of Sec. 79-1003, R. R. S. Nebr. 1943, which provides that only residents of the Omaha School District are eligible to vote for members of the School Board of the City of Omaha. The appellees, the purported Board of Regents of the Municipal University of the City of Omaha, have certified a tax on all taxable property within the city limits of the City of Omaha for the year 1962 and prior years, including taxable property in the City of Omaha within School District No. 66 and 54 of Douglas County, Nebraska. The appellee Howell, acting under the certification made by the Board of Regents under the provisions of Sec. 14-1317, R. R. S. Nebr. 1943, is collecting such tax from all persons within the city limits of the City of Omaha despite the fact that resident taxpayers, duly qualified electors under the Constitution and Laws of the State of Nebraska, are disenfranchised from having any voice either directly or indirectly in the management and control of the institution which they are taxed to suport. The actual levy as certified and as now being collected is two mills on the dollar of taxable valuation for the benefit of the Municipal University of the City of Omaha.

The Federal question herein involved was first raised in the petition filed in the District Court of Douglas County, Nebraska, (R.3) wherein it is alleged that Sec. 14-1317, R. R. S. Nebr. 1943, is unconstitutional under the provisions of the Fourteenth Amendment to the Constitution of the United States by abridging their privileges or immunities as citizens of the United States; by depriving them of property without due process of law and by denying to them the equal protection of the laws of the State of Nebraska. The action was filed in the District Court of Douglas County, Nebraska, on October 30, 1962. On November 21, 1962, the appellees Board of Regents and the appellees members of the School Board of the City of Omaha filed Demurrers. On November 30, 1962, the date set for hearing of the plaintiffs' request for temporary injunction, the District Court heard argument on the two Demurrers on file at that time sustaining the Demurrer of the appellees members of the School Board and taking the Demurrer of the appellees Board of Regents under advisement. On Deember 19, 1962, the defendant appellee Howell filed a Demurrer. On December 20th, the date to which the hearing on the temporary injunction had been continued, the District Court entered an order over the objection of the appellants further continuing the hearing on the temporary injunction until December 31, 1962. On December 28, 1962, the Court entered an order sustaining the Demurrer of the appellees Board of Regents and gave the appellants ten days to amend their petition or to file an amended petition. On December 31, 1962, the hearing on the temporary injunction set for that date was continued indefinitely. On January 2, 1963, the parties appeared in District Court, plaintiffs amended

their petition instanter by interlineation, the Demurrers were permitted to stand to the amended petition, all of the Demurrers were sustained, the appellants elected to stand on their petition as amended and the action was dismissed. Thereafter, on January 8, 1963, the appellants filed their notice of appeal to the Supreme Court of the State of Nebraska and in due course the Supreme Court of the State of Nebraska entered its opinion as shown in Appendix A hereto, sustaining the action of the District Court in dismissing the action.

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal are analogous to those involved in *Gomillion v. Lightfoot*, 364 U. S. 339, 81 S. Ct. 125, *Baker v. Carr*, 369 U. S. 186, 82 S. Ct. 691, and *Gray v. Sanders*, 370 U. S. ....., 83 S. Ct. 801. The issues are important to the appellants herein, to the appellees, to all local governmental units in the United States and to all citizens resident in areas in which a similar disenfranchisement may have occurred.

The issue herein, of course, is not the partial disenfranchisement of a duly qualified elector such as that discussed in *Baker v. Carr*, supra, and *Gray v. Sanders*, supra, but rather the total disenfranchisement of a duly qualified elector such as was involved in *Gomillion v. Lightfoot*, 364 U. S. 339, 81 S. Ct. 125. The disenfranchisement occurs in the case at bar, not by positive action as happened in *Gomillion*, but rather by the lapse of time and changes in circumstance as involved in *Baker v. Carr*. If a partial disenfranchisement of an elector or the total disenfranchisement of an elector for a person who is to exercise authority over him and his property is invalid

under the provisions of the Fourteenth Amendment, it must necessarily follow that the total disenfranchisement of a qualified elector from participating in the selection of a person or persons who are to levy and collect taxes from him and spend that money, likewise is void and invalid under the provisions of the Fourteenth Amendment. In the case at bar, as in the case of *Gomillion v. Lightfoot*, the facts were not in dispute inasmuch as the question arose on the sustaining of a Demurrer to the appellants' petition.

The discrimination here involved does not arise because of any particular color of the voters involved but rather merely because of the place of residence of the appellants and persons similarly situated with them. The situation is exacerbated by the permitting of persons who are not taxed to support the Municipal University of Omaha, because of their residence outside the city limits of the City of Omaha, but who are within the Omaha School District, to vote for members of the Board of Education of the School District of the City of Omaha who in turn appoint the members to the Board of Regents of the Municipal University of the City of Omaha. A map delineating the various boundaries of the Districts and the City involved in this litigation is appended hereto as Appendix C.

The exclusion of the appellants and persons similarly situated from a right to have some voice in the management of the institution which they are taxed to support comes about through the operation of the annexation statutes of the City of Omaha together with the failure to provide for the concomitant extension of the boundaries

of the School District of the City of Omaha as the boundaries of the City of Omaha move westward. The exclusion of the appellants and other persons similarly situated from a voice in the management of the Municipal University of the City of Omaha is no less invidious because it comes about, as it were, by default rather than by positive action on the part of the Legislature.

The invalidity of the disenfranchisement of a portion of a municipality's otherwise duly qualified electors to participate in municipal government is settled by *Gomillion v. Lightfoot*, 364 U. S. 339, 81 S. Ct. 125. In that case Mr. Justice Frankfurter, speaking for the Court at 364 U. S. 339, 342, said with regard to the appellees' defense that a State has plenary power over its municipalities:

> "The respondents invoke generalities expressing the state's unrestricted power — unlimited, that is, by the United States Constitution — to establish, destroy, or reorganize by contraction or expansion its political subdivisions, to-wit, cities, counties, and other local units. We freely recognize the breadth and importance of this aspect of the state's political power. To exalt this power into an absolute is to misconceive the reach and rule of this court's decision in the leading case of Hunter v. City of Pittsburgh, 207 U. S. 161, 28 S. Ct. 40, 52 L. Ed. 151, and related cases relied upon by respondants. * * * Thus, a correct reading of the seemingly unconfined dicta of Hunter and kindred cases is not that the state has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the state's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases. * * * When a state exercises power wholly within the domain of state interest it is insulated from fed-

eral judicial review. But such insulation is not carried over when state power is used as an instrument fo circumventing a federally protected right."

In *Baker v. Carr*, 369 U. S. 186, 82 S. Ct. 691, Mr. Justice Brennan in discussing the claim of the petitioners claiming to have been disenfranchised by the failure of the State Legislature to reapportion in accordance with the Constitution, a discrimination arising as in this case from lack of action rather than by positive denial of rights, said:

"• • • These appellants seek relief in order to protect or vindicate an interest of their own, and of those similarly situated. Their constitutional claim is in substance that the 1901 Statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the state's constitution or of any standard, effecting a gross disproportion of representation to voting population. The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-a-vis voters in irrationally favored counties. • • •

"We hold that the claim pleaded herein neither rests upon or implicates the guarantee clause a that its justiciability is therefore not foreclosed by our decisions of cases involving that clause. The district court misinterpreted Colgrove v. Green and other decisions of this court on which it relied. Appellants' claim that they are being denied equal protection is justiciable, and if 'discrimination is sufficiently strong, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.' Snowden v. Hughes, 321 U. S. 111, 64 S. Ct. 397, 402, 88 L. Ed. 497."

In *Gray v. Sanders*, ... U. S. ....., 83 S. Ct. 801, involving the Georgia county unit system in conducting a Democratic primary election, Mr. Justice Douglas speaking for the court said:

> "The Fifteenth Amendment prohibits a state from denying or abridging a Negro's right to vote. The Nineteenth Amendment does the same for women. If a state in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable. See Terry v. Adams, 345 U. S. 461, 73 S. Ct. 809, 97 L. Ed. 1152. How then can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county. Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote — whatever race, whatever sex, whatever their occupation, whatever their income *and wherever their home may be in that geographical unit*. This is required by the equal protection clause of the Fourteenth Amendment. The concept of 'we the people' under the constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his state when he casts his ballot in favor of one or of several competing candidates underlies many of our decisions.
>
> " • • • The concept of political equality in the voting booth contained in the Fifteenth Amendment extends to all phases of state elections, see Terry v. Adams, supra; and as previously noted there is no indication in the constitution that homesite or occupation affords a permissible basis for distinguishing between qualified voters within the state. • • •"
>
> "The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg

Address to the Fifteen, Seventeenth and Nineteenth Amendments can mean only one thing — one person, one vote." (Emphasis supplied.)

This court has not passed directly on the question of the propriety of the imposition of a tax upon a duly qualified elector who is disenfranchised from voting or having any voice in the management or control of the institution for which he is taxed to support.

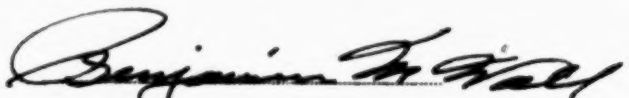
It is submitted that the decision of the Supreme Court of Nebraska disregards in their entirety the opinions of this Court in *Gomillion v. Lightfoot*, 364 U. S. 339, 81 S. Ct. 125, *Baker v. Carr*, 369 U. S. 186, 82 S. Ct. 691, and *Gray v. Sanders*, ... U. S. ....., 83 S. Ct. 801. The questions presented on this appeal substantially affect the rights of all citizens of the United States with regard to the control of the smaller governmental units of which they may happen to be a part. We believe that the questions presented on this appeal are substantial and that they are of public importance.

Respectfully submitted,

BENJAMIN M. WALL,
of HANEY, WALSH & WALL,
Counsel for Appellants.
610 Service Life Building
Omaha, Nebraska, 68102

I, Benjamin M. Wall, one of the attorneys for petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on October 14, 1963, I served copies of the foregoing Jurisdictional Statements of the Appellants upon the Appellees by de-

positing the same in a United States mailbox with first class postage prepaid, addressed to Seymour Smith and W. Ross King, counsel of record for the appellees other than the appellee Howell, 720 Keeline Building and 1130 First National Bank Building, Omaha, Nebraska, and to Francis Pane, counsel of record for the appellee Howell, County Courthouse of Douglas County, Omaha, Nebraska.



610 Service Life Building
Omaha, Nebraska 68102

Counsel for Appellants.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1963

NO. .....

GERALD L. RATIGAN, et al, Appellants,

vs.

DAVIS, et al, Appellees.

ENTRY OF APPEARANCE OF COUNSEL

Comes now Benjamin M. Wall, a member of the Bar of the Supreme Court of the United States, and enters his appearance in this cause on behalf of the Appellants herein.

BENJAMIN M. WALL,
of HANEY, WALSH & WALL,
Counsel for Appellants.
610 Service Life Building
Omaha, Nebraska, 68102

APPENDIX A

RATIGAN V. DAVIS

35456 — Filed June 7, 1963

1. The maxim of no taxation without representation has a very restricted meaning since it is not contained in the Constitution, and representation is not a condition precedent to the levy of an authorized tax.

2. Where the electors of a municipality have voted a tax upon all tangible property within the city pursuant to authority granted by the Legislature, representation in the Legislature is sufficient to defeat a claim of taxation without representation by electors of the municipality.

3. Where a tax was voted by the electors of a city upon all tangible property not exempt in the city, property within areas subsequently annexed becomes liable for the levy of the tax in the absence of a contrary statutory provision.

4. Where a statute authorizes the electors of a city to impose a tax on tangible property within the city, the electors in areas subsequently annexed cannot properly question the validity of the tax on the ground that they have no voice in the selection of those charged with the determination and certification of the amount to be levied.

5. Under such circumstances the authority to levy the tax is deemed to flow directly from the Legislature. The levy of the tax is corporate action pursuant to state authority in which electors in subsequently annexed areas cannot void the tax as to them because of no representation on the levying body.

6. Except as limited by the Constitution, the Legislature has plenary authority over municipal corporations.

Heard before White, C. J., Carter, Messmore, Yeager, Spencer, Boslaugh, and Brower, JJ.

CARTER, J.

Plaintiffs brought this action for themselves and all others similarly situated in School District No. 66, Douglas County, Nebraska, and School District No. 54, Douglas County, Nebraska, who reside within the corporate limits of the city of Omaha, Nebraska, to enjoin the county treasurer of Douglas County and others from collecting taxes assessed against their property within said school districts and within the city limits of Omaha for the benefit of the municipal university of the city of Omaha. The trial court sustained general demurrers to the petition. Plaintiffs stood on their petition and the action was dismissed. Plaintiffs have appealed to this court.

The petition shows that plaintiffs reside in, own property in, and are electors of school district No. 66, and within areas within said district which has been annexed to and become a part of the city of Omaha. By authority of section 14-1301, R. R. S. 1943, the municipal university of the city of Omaha was established. Section 14-1305, R. R. S. 1943, provides for a board of regents of nine members with staggered terms of 4 years, such members to be selected by the board of education of the city of Omaha. By section 14-1317, R. R. S. 1943, the board of regents is authorized to certify the amount of the levy to the city council of the city of Omaha to be levied upon all tangible property within the city of Omaha for the support of the municipal university. The contention here

made is that, as the petitioners reside and own property within the city of Omaha but do not reside or own property within the school district of Omaha, and as the regents of the municipal university are selected by the school board of the school district of Omaha, the petitioners are being taxed without representation and in violation of various sections of the state and federal Constitutions.

Plaintiffs assert that the fixing of the tax to be levied violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. They assert also that the levying of the tax violates the due process clause of the Nebraska Constitution, Article I, section 3, Constitution; the special privileges or immunities clause, Article I, section 16, Constitution; the no discrimination clause, Article I, section 25, Constitution; the free elections clause, Article I, section 22, Constitution; and the definition of electors clause, Article VI, section 1, Constitution.

The board of regents has certified a levy on all the tangible property within the city limits for the year 1962, including the portions of school districts Nos. 66 and 54 that are within such city limits. Plaintiffs concede that at the time when the city and the school district of Omaha were coextensive in their territorial limits, no question of unconstitutionality existed. It is asserted that the annexation by the city of the lands in school districts Nos. 66 and 54 has subjected existing statutes to attack for unconstitutionality, as hereinbefore set forth.

The act authorizing the establishment of the municipal university was enacted in 1929. At that time its board of regents was authorized to certify a tax levy not

exceeding one mill on the dollar upon the assessed value of all taxable property in the city. The act was amended in 1951 to provide that by a vote of the qualified electors of the city the levy could be increased to two mills on the dollar. By a vote of the electors of the city, prior to the annexation of the areas in school districts Nos. 66 and 54, the maximum levy was increased to two mills. In *Carlberg v. Metcalfe*, 120 Neb. 481, 234 N. W. 87, the power of the board of regents to certify the amount of the tax levy for the support of the university was challenged as unconstitutional. The court held that, even if the regents levied the tax and the function of the city council was administrative only, the electors of the city having consented to the delegation of the power to tax to the board of regents, the delegation of power could not be questioned and that the act was constitutional.

The maxim that taxation without representation, or taxation without the consent in some form of those who are to be taxed, is relied on to sustain the position of the plaintiffs. Maxims of government, not contained in the Constitution, are given a very restricted meaning. It does not mean, as many seem to think, that no person can be taxed unless, in the body that determines the amount of the tax to be levied, he is represented by someone for whom he has a right to vote. It has never had such a legal meaning. So construed, a large portion of the people of the state would be exempted from the payment of taxes, including infants, nonresidents, and disqualified voters. Representation is not made the basis of taxation. The principle involved is well stated in the early case of *State ex rel Bulkeley v. Williams*, 68 Conn. 131, 35 A. 24, 48 L. R. A. 465, wherein it is said: "The defendant urges

that taxation and representation are indissolubly connected by the underlying principles of free government, and that this (the commission which directs the affairs of the Bridge District and makes requisitions on the towns for such funds as it deems necessary, not having been selected by them) is a sufficient defense against the payment of the order which has been drawn upon him, since it can be paid only out of moneys raised by town taxation. * * * Taxes can, indeed, under our system of government, only be imposed by the free consent of those who pay them, or their representatives; and for purposes which they approve. But the inhabitants of these towns were represented in the General Assembly, by which the laws now brought in question were enacted. The Legislative power, after defining the general purposes of taxation, to confer upon local public corporations the right to determine the amount of the levy within the territory under their jurisdiction, is unquestionable; and in its exercise it is immaterial whether the corporations, to which that function is entrusted, or between which it is shared, be called counties or towns, school districts or bridge districts. When a levy is voted, the action is corporate action, deriving its obligatory force wholly from the authority of the State." See, also, *Clark v. Leathers*, 9 Ky. L. 558, 5 S. W. 578; *Gadd v. McGuire*, 69 Cal. App. 347, 231 P. 754; *Kecsis v. Chicago Park Dist.*, 362 Ill. 24, 198 N. E. 847, 103 A. L. R. 141.

It seems clear under the foregoing holdings, since plaintiffs were represented in the Legislature that enacted the law, that they had the representation required by the maxim of no taxation without representation. The plaintiffs rely on several cases including *State ex rel Harte v.*

Moorhead, 99 Neb. 527, 156 N. W. 1067; *State ex rel Wright v. Brown*, 131 Neb. 239, 267 N. W. 466; *Summerville v. North Platte Valley Weather Control Dist.*, 170 Neb. 46, 101 N. W. 2d 748; and *Anderson v. Carlson*, 171 Neb. 741, 107 N. W. 2d 535. These cases deal with the organization of districts and the failure of the organizing authority to follow constitutional requirements. They are distinguishable from the case before us which deals only with the validity of a tax in an already existing taxing district. We quite agree, as we have consistently held, that the authority which is required to establish districts, whether they be for election, taxation, or other governmental purposes, must comply with the uniformity, equality, and due process provisions of the state and federal Constitutions. But we have no such problem here, except incidentally. Whether or not the tax levy here made is valid is dependent on entirely different considerations. The first consideration is, of course, that representation is not a condition precedent to the right to tax.

The briefs of the parties concede that the electors of the city of Omaha authorized the increase of the levy for the support of the university to two mills at a time when the city limits were coextensive with those of the school district of the city of Omaha and before the areas in school districts Nos. 66 and 54 were annexed to the city. No complaint is made as to the validity of the tax at that time. When the areas in school districts Nos. 66 and 54 were annexed, they did not ipso facto become a part of the school district of Omaha by virtue of section 79-1002, R. S.Supp., 1961.

The Legislature has plenary power over the boun-

daries of school districts. *Nickel v. School Board of Axtell*, 157 Neb. 913, 61 N. W. 2d 566. It has complete power over the organization, function, and finances of a school district. *Schutte v. Schmitt*, 162 Neb. 162, 75 N. W. 2d 656. It may establish different qualifications for electors of school districts. *Farrell v. School Dist. No. 54*, 164 Neb. 853, 84 N. W. 2d 126. It also has plenary power over all municipal corporations. Except as limited by the Constitution, its power over municipalities is absolute. The question here presented is altogether different from local districts set up and administered by private individuals where the property owner has a right to be heard as a matter of due process, such as in the case of *Anderson v. Carlson, supra.*

Upon the annexation of the areas in school districts Nos. 66 and 54 to the city of Omaha, the property in the areas annexed became liable for all the obligations of the city, including the two-mill levy for the support of the municipal university. This is made abundantly clear in *Hustead v. Village of Phillips*, 131 Neb. 303, 267 N. W. 918, wherein it is said: "As to the general issues involved in this case, it may be said that, in the absence of specific constitutional limitations, the power of the legislature to change the boundaries of municipal corporations, and to apportion the municipal debts upon such change of boundaries, is absolute. When the act or statute authorizing a change of boundaries is silent as to apportionment of municipal debts, the territory embraced within the new boundaries becomes liable for all prior debts, and the territory excluded from the new boundaries is forever released from all municipal debts." See, also, *Lynch v. Howell*, 165 Neb. 525, 36 N. W. 2d 364. The *Hustead* case

is one where electors had no vote as to whether or not the boundaries were to be changed. It logically follows that where a two-mill levy was approved by the electors of the city for the support of the municipal university before the annexation of the areas in school districts Nos. 66 and 54, the property in the latter districts became burdened with the tax the same as any other indebtedness of the city. The fact that electors in the annexed areas do not have a voice in the selection of those charged with the function of certifying the amount of the validly imposed mill levy cannot have the effect of voiding the tax properly and legally imposed on tangible property in the annexed areas. Under such circumstances the electors in the annexed areas can no more question the validity of the mill levy than can an infant, a nonresident, or a disqualified elector.

It may be that the Legislature has a function to perform in order to avoid other situations that may arise with reference to constitutional requirements, but under the facts presented in the instant case we find no constitutional provision, federal or state, having the effect of voiding the two-mill tax levy on the tangible property within the annexed areas.

We do not deem it necessary to discuss other questions raised. No constitutional provision stands as a bar to the levy of two mills on the dollar on the assessed value of the tangible property in the annexed areas for the support of the municipal university. The trial court correctly sustained general demurrers to the petition of the plaintiffs and its judgment is affirmed.

AFFIRMED.

APPENDIX B

R. R. S. Nebraska 1943

14-1304. Board of regents; members. The board of regents of the municipal university shall consist of nine members who shall be appointed by the board of education of the city.

14-1305. Board of regents; members; terms; vacancies. The members of the board of regents shall hold office from the date of their appointment and qualification until the first day of July following and for the terms thereafter herein fixed, to wit: Three members to the first day of July following only; two members for one year, two for two years, and two for three years; and until their respective successors have been duly selected and qualified. Thereafter each year at the June meeting of the board of education, the board of education shall select regents of the municipal university to fill the place of such regents whose terms expire on the first of July next following, who are to serve for a full term of four years from the first day of July following, and until their successors have been duly selected and qualified. The board of education shall fill any vacancies existing in the office of regent by the appointment of a regent or regents to hold office for the unexpired term and until their successors have been selected and qualified. Resignations from the board of regents shall be made to the chairman of the board, and by him reported to the respective bodies herein given the power of appointment.

14-1317. Municipal university; tax; limitations; method of increase; power to borrow. (1) The board of regents shall, in the month of July of each year, certify

a tax for the support of such municipal university, including the purchase of lands and construction of buildings, the purchase of equipment, and the repairs of the buildings and equipment of such municipal university, and including such amount as shall be necessary for the annual operation of the university for the fiscal year commencing on the first day of January following, not exceeding in any one year one mill on the dollar upon the assessed value of all the taxable property in such city, except intangible property, which levy the president and secretary of such board of regents shall, on or before July 31, certify to the city council, which is hereby authorized and required to cause the same to be levied and to be collected by the treasurer of the city as are other taxes, and paid over by him to the treasurer of such board of regents, subject to the order of said board of regents. If in any year the amount so certified and collected is not needed for the purposes of such university, the balance shall be credited to the sinking fund of such university to be used for additional buildings or other necessary permanent equipment; *Provided* that the maximum mill levy may be increased from one mill to not to exceed two mills on the dollar of the assessed value of all the above described property within such city, except intangible property, by a vote of the qualified electors of such city, as provided for by subsection (2) of this section, at any general state or city election, or at a special election called for that purpose; *and provided further,* that where the qualified electors of such city at any general state or city election have by a majority of those voting in the election voted in favor of increasing such maximum mill levy to two mills on the dollar upon the assessed value

of all the taxable property in such city, except intangible property, and when in any year such total assessed valuation of such city is less than the total valuation used as the basis for taxation in such city in 1952, the board of regents may fix a levy sufficient to produce as much total revenue as was produced by the 1952 levy.

(2) Notice of the time and place of holding the election, provided for by subsection (1) of this section, shall be given once each week for three successive weeks, the first notice to be given at least thirty days prior to the election in at least one newspaper of general circulation printed and published within such city. The proposition to increase the maximum mill levy may be submitted to the qualified electors upon the affirmative vote of two-thirds of the members of the board of regents, and shall state the maximum mill levy which it proposes to levy annually. If a majority of those voting at the election on the proposition vote in favor of such increased maximum mill levy, then such fact shall be certified to the city council and thereafter the city council shall annually cause to be levied, according to law, such tax as may be certified by the board of regents, but not exceeding the mill levy so voted.

14-1318. Municipal university; treasurer; duties; bond. The treasurer of the county in which said metropolitan city is located shall be ex officio treasurer of the board of regents. He shall prepare and submit to the board, in writing, a monthly report of the state of its finances, receive and receipt for the money collected by the employees of the board, and pay out the same and all other funds of the board only on warrant signed as

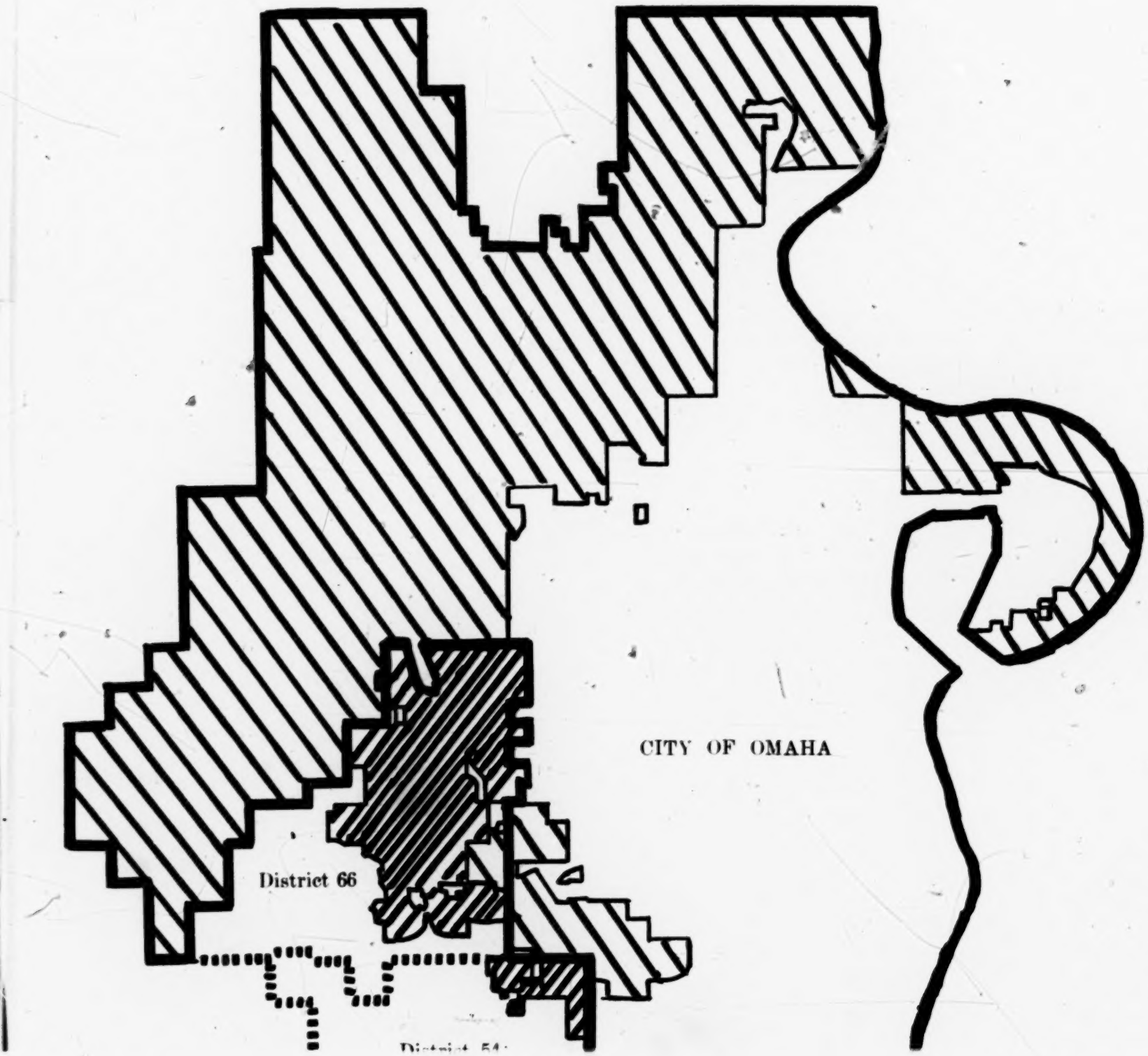
the board of regents shall by resolution direct. The ex officio treasurer shall give a surety bond payable to the board of regents for the faithful performance of his duties in such amount as the board may deem necessary; the bond to be approved by the board, and the premium thereon paid by the municipal university. Such county shall receive as full compensation for the collection and disbursement of the funds of the municipal university and its board of regents the sum of two thousand dollars per annum, to be paid quarterly by the municipal university; *Provided, further*, that the county treasurer shall receive no additional compensation for the administration of the funds of the municipal university.

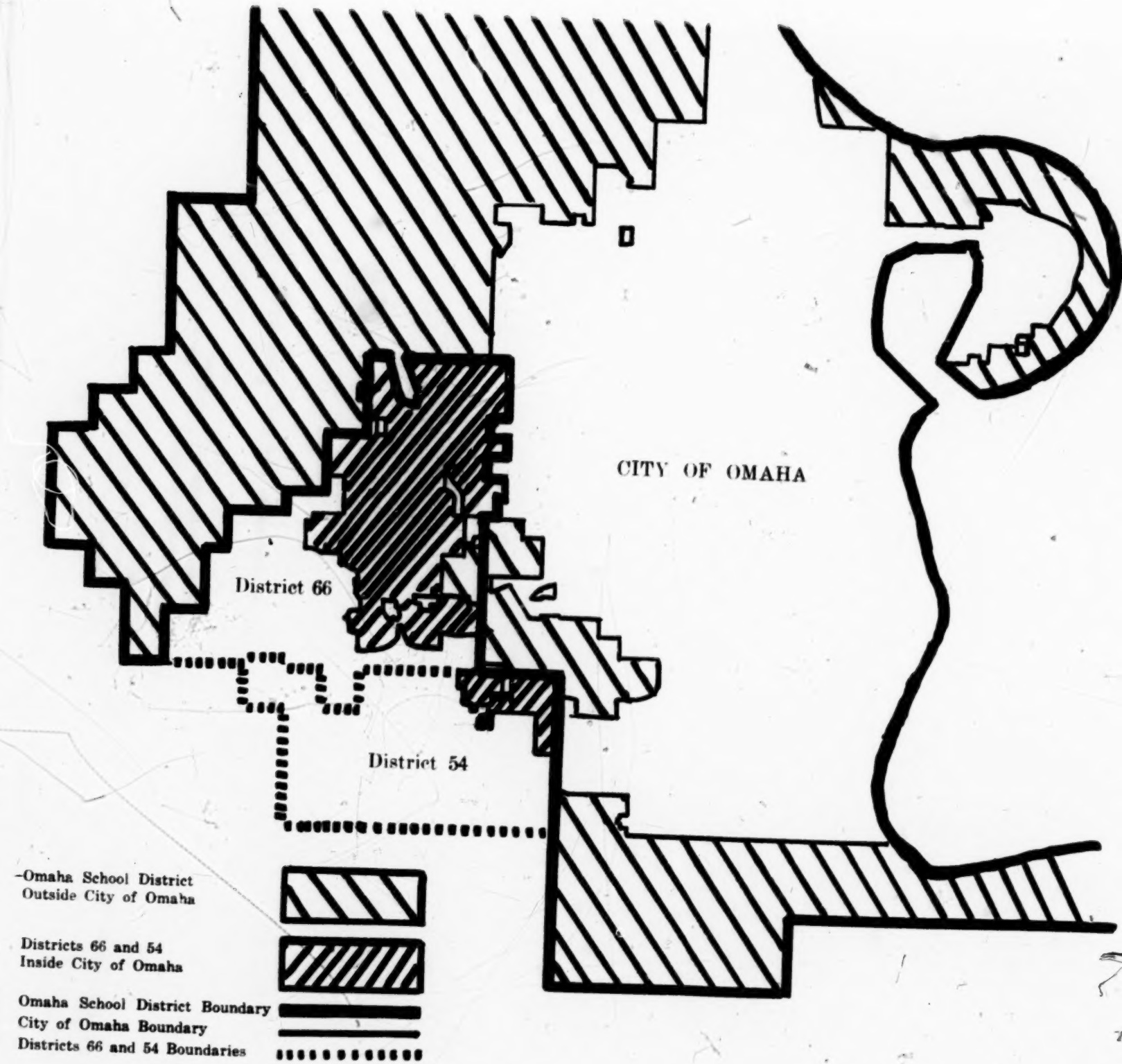
25-319. Class actions; representation. When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

79-1003. Board of education; members; nomination; election; term; qualifications required. The board of education of a fifth class school district shall consist of twelve members to be chosen by the qualified electors of the entire school district lying wholly or partially within the corporate limits of such city by a plurality of votes. Each member of the board of education must be a taxpayer in and a resident of such school district. At each general election six members of the board shall be elected to serve for four years from and including the first Monday of the January following their election, or until their successors are elected and qualified. All persons elected as members of the board of education shall, before

the first Monday in January following their election, take and subscribe to the usual oath of office. In case any person so elected shall fail so to do, his election shall be void, and the vacancy thereby occasioned shall be filled by the board. Candidates shall be nominated at the primary election upon a nonpolitical ballot. The names of the twelve candidates receiving the highest number of votes at such primary election, or of all candidates if there are less than twelve upon the primary ballot, shall be placed upon the official ballot for the board of education at the general election. For the general board of education election, the ballot shall be prepared in substantially the same form and the names rotated as is provided for election of other nonpolitical candidates, and the six persons receiving the highest number of votes shall be elected to the board of education. Any person who shall be a candidate at the primary election shall, at least forty days prior to the primary, file with the officer authorized to conduct such election a statement of candidacy setting out his qualifications and willingness to abide by the election, such statement to be subscribed and sworn to before a notary or other person qualified to take oaths. There shall be no filing fee or any other requirement than the statement above provided for to enable qualified electors to become candidates for the board of education.

APPENDIX C CITY OF OMAHA — SCHOOL DISTRICT




CITY OF OMAHA
District 66
District 54
Omaha School District
Outside City of Omaha
Districts 66 and 54
Inside City of Omaha
Omaha School District Boundary
City of Omaha Boundary
Districts 66 and 54 Boundaries

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In the Supreme Court of the United States

October Term, 1963

No. 547

GERALD L. RATIGAN, et al.,

Appellants,

vs.

HERBERT DAVIS, et al.,

Appellees.

On Appeal from the Supreme Court of the State of Nebraska

MOTION OF APPELLEES HERBERT DAVIS, HARRY D. BARBER, FRANK FOGARTY, SAMUEL GREENBERG, HENRY C. KARPF, PETER KIEWIT, RALPH KIPLINGER, MRS. JOHN MERRIAM AND VARRO RHOADES, TO DISMISS APPEAL OR IN THE ALTERNATIVE, TO AFFIRM JUDGMENT.

William R. King,
620 First National Bank Bldg.
Omaha 2, Nebraska

Seymour L. Smith,
720 Keeline Bldg.
Omaha 2, Nebraska

Members of the Bar of the Supreme Court of the United States.

Counsel for named Appellees.

Cockle Printing Company—Law Briefs—Omaha, Nebr.

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In the
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Appellants,

vs.

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MOTION OF APPELLEES HERBERT DAVIS, HARRY D. BARBER, FRANK FOGARTY, SAMUEL GREENBERG, HENRY C. KARPF, PETER KIEWIT, RALPH KIPLINGER, MRS. JOHN MERRIAM AND VARRO RHOADES, TO DISMISS APPEAL OR IN THE ALTERNATIVE, TO AFFIRM JUDGMENT.

MOTION TO DISMISS APPEAL, OR IN THE ALTERNATIVE, TO AFFIRM

Appellees, Herbert Davis, Harry D. Barber, Frank Fogarty, Samuel Greenberg, Henry C. Karpf, Peter Kiewit, Ralph Kiplinger, Mrs. John Merriam and Varro Rhoades (sometimes referred to hereinafter as "named appellees"), members of the Board of Regents of the Municipal University of Omaha and only defendants now

involved as appellees, except defendant Howell (see appellants' Jurisdictional Statement, to p. 4), pursuant to Rule 16 of the Revised Rules of this Court, respectfully move the Court to dismiss the appeal; or in the alternative, these appellees respectfully move the Court to affirm the judgment below, all on the ground that no substantial Federal question is presented by the appeal.

———o———

STATEMENT OF APPELLEES

Correcting Omissions and Inaccuracies in the Statement of Appellants.

I. The petition in the District Court of Douglas County (R. 3) does not allege as stated (Jurisdictional Statement top p. 6) that Sec. 14-1317 R. R. S. Nebr. 1943, is unconstitutional under the provisions of the Fourteenth Amendment. It merely alleges that the *assessment and collection of the taxes* are unconstitutional. (See post, page 4.)

II. Appellants fail to mention that the voters of Omaha did, at a special election held in 1951, pursuant to statutory authority (Sec. 14-1317 R. S. Neb., 1943, Reissue 1962, shown in Appendix A, post, page 10), authorize the tax of two mills for the support of the University, complained of by appellants. (Exhibit—Certificate, Appendix B, post, page 13.) Although appellants' property had not been annexed to the City of Omaha and they were not voters therein at that time, nevertheless, as pointed out in the Argument (post, page 5), such property is legally taxable for the purpose.

III. The Board of Regents of the University does not "levy and collect" any taxes as asserted by appellants (Jurisdictional Statement, top page 8) because,

(a) They merely certify the amount to be levied for the purposes of such University to the City Council of the City. The amount so certified cannot exceed the amount previously authorized by the voters of the City. The City Council "levies" the tax (Sec. 14-1317, *supra*).

(b) The taxes in question are collected by the Treasurer of the City as are other taxes, and paid over by him to the Treasurer of such Board of Regents, subject to the order of said Board of Regents (Section 14-1317, *supra*).

IV. Appellants are not disenfranchised because,

(a) The appellants, as voters of the City, are permitted to vote for candidates for the City Council (Section 14-201, R. S. of Neb., 1943, Reissue 1962, shown in Appendix C, post, page 15).

(b) The County Treasurer of Douglas County, Nebraska, the county in which the metropolitan City of Omaha is located, is ex officio Treasurer of such city (Section 14-551, R. S. of Neb., 1943, Reissue 1962, shown in Appendix D, post, page 15).

(c) The County Treasurer of Douglas County, Nebraska is ex officio Treasurer of the Board of Regents (Section 14-1318, R. S. of Neb., 1943, Reissue 1962, shown in Appendix E, post, page 15).

(d) The appellants are permitted to vote for candidates for the office of Treasurer of such county, it being

an elective office (Section 32-308, R. S. of Neb., 1943, Reissue 1960, shown in Appendix F, post, page 16).

V. Appellants are represented in the Legislature of Nebraska which enacted the pertinent statutes referred to ante.

VI. Appellants, residents of Omaha, enjoy the same benefits flowing from the Municipal University that other residents of the City of Omaha enjoy (Sec. 14-1308, Rev. Stats. Nebr. 1943, Reissue 1962, Appendix G, post page 17).

VII. Appellants do not show that they ever objected to the levy of the tax before the City Council, the levying body for whose members they are privileged to vote.

ARGUMENT

Appellants have no remedy by Appeal.

No claim is made by appellants that there is drawn in question any treaty or statute of the United States, or decision against its validity; or that there is drawn in question the validity of a statute of any state on the ground of being repugnant to the Constitution, treaties or laws of the United States, and the decision in favor of validity.

The only question under the Federal Constitution purportedly raised by appellants is found in Paragraph VIII of their petition in the State District Court (R. 3). It is that the "assessment of the taxes" and the "attempted collection" of same are void as in conflict with the Fourteenth Amendment. No other alleged ground is anywhere asserted, except that in the prayer of their petition appellants attack the constitutionality of Sec. 14-1317 *supra*

(Appendix A), but without specifying any constitutional provisions, state or federal, that it offends.

The prayer is not a part of the essential petition under Nebraska decisions. It tenders no issue, and neither adds to nor takes from the evidence required. *Standard Reliance Insurance Co. v. Ruth Schoenthal,* 171 Neb. 490, 106 N. W. 2d 704.

A demurrer lies to the statement of facts in the petition constituting the supposed cause of action, not to the prayer for relief, which may be much in excess of what those facts warrant the Court to grant. *Reid v. City of Omaha,* 150 Neb. 286, 34 N. W. 2d 375.

The Supreme Court of Nebraska did not pass upon the constitutionality of this or any other statute, but only upon the validity of the tax. (See opinion appellants' Appendix A.)

Therefore, no substantial Federal question is presented for this appeal under 28 U. S. C. A., Sec. 1257. *Rohr Aircraft Corp. v. San Diego County,* 362 U. S. 628, 80 S. Ct. 1050, 4 L. Ed. 2nd 1002; *Charleston Federal Savings & Loan Ass'n. v. Alderson,* 324 U. S. 182, 65 S. Ct. 624, 89 L. Ed. 857; *Jett Bros. Co. v. City of Carrollton,* 252 U. S. 1, 40 S. Ct. 255, 64 L. Ed. 421.

There is no Substantial Federal Question Presented Invoking any Method of Review by this Court.

The statute authorizing the two mill levy when approved by the voters (Sec. 14-1317, supra), and the statute authorizing annexation (Sec. 14-117, R. S. of Neb., 1943, Reissue 1963, Appendix H, post, page 17) are both silent as to any exemption from taxation for the University,

of property annexed to the City subsequent to such vote. Therefore, the voter authorization extends to the annexed property of appellants, within *Hustead v. Village of Phillips*, 131 Neb. 303, 267 N. W. 919, 921, holding:

> "* * * When the act or statute authorizing a change of boundaries is silent as to apportionment of municipal debts, the territory embraced within the new boundaries becomes liable for all prior debts, * * *."

Appellants' sole ground for the claim of a substantial Federal question is that they do not have the privilege of voting for candidates for the Board of Education of the School District of Omaha, which Board, pursuant to statutory authority, appoints the Board of Regents of the Municipal University. This Board is an entirely separate entity (14-1308, supra Appendix G, post, page 17).

Appellants' complaint results from the passage by the Legislature of Nebraska of a proviso to Section 79-1002, R. S. of Neb., 1943, 1961 Cum. Supp. (shown at Appendix I, post, page 18). By this proviso territory of another high school district annexed to the City of Omaha does not become a part of the School District of Omaha *ipso facto* as before, but remains a part of the original district, unless and until it votes in favor of merging with the Omaha school district. It is this proviso, passed by a legislature in which appellants were represented, that leaves them in School District No. 66 rather than placing them in the Omaha District. It was passed for the obvious benefit of District No. 66. Its effect on this remote and indirect control of the University by appellants was merely coincidental. They still have adequate voting rights relating to the University.

The action of the Legislature in passing these statutes was not an arbitrary or capricious exercise of plenary power to fix the boundaries of governmental subdivisions as in the cases cited by appellants; nor is any right, title, privilege or immunity of appellants infringed.

Appellants' contention, based upon the maxim of taxation without representation, is fully met by this Court's decision in *Thomas v. Gay*, 169 U. S. 264, 18 S. Ct. 340, 42 L. Ed. 740, where complainants, nonresidents of the Territory of Oklahoma, were taxed upon cattle owned by them and grazing upon Indian reservations annexed for judicial purposes. The holding was:

> "Undoubtedly there are general principles, familiar to our systems of state and Federal government, that the people who pay taxes imposed by laws are entitled to have a vote in the election of those who pass the laws, and that taxes must be assessed and collected for public purposes, and that the duty or obligation to pay taxes by the individual is founded in his participation in the benefits arising from their expenditure. But these principles, as practically administered, do not mean that no person, man, woman, or child, resident or nonresident, shall be taxed unless he was represented by someone for whom he had actually voted, nor do they mean that no man's property can be taxed unless some benefit to him personally can be pointed out. Thus it has been held that personal allegiance has no necessary connection with the right of taxation; an alien may be taxed as well as a citizen. Mager v. Grima, 49 U. S. 8 How. 494 (12:1170); Witherspoon v. Duncan, 71 U. S. 4 Wall. 210 (18:339). So, likewise, it is settled law that the property, both real and personal, of nonresidents may be lawfully subjected to the tax laws of the state in which they are situated."

In *Loughborough v. Blake*, 5 Wheat. 317, this Court said:

> "• • • Representation is not made the foundation of taxation. • • •
>
> "• • • Although, in theory, it might be more congenial to the spirit of our institutions, to admit a representative from the district, it may be doubted, whether, in fact, its interests would be rendered thereby the more secure; and certainly, the constitution does not consider their want of a representative in congress as exempting it from equal taxation.
>
> "If it were true, that, according to the spirit of our constitution, the power of taxation must be limited by the right of representation, whence is derived the right to lay and collect duties, imposts and excises, within this district? If the principles of liberty, and of our constitution, forbid the raising of revenue from those who are not represented, do not these principles forbid the raising it by duties, imposts, and excises, as well as by a direct tax? • • •"

The Supreme Court of Nebraska correctly held that the maxim of taxation without representation was satisfied by representation in the legislature and that the method of selecting the Regents, as administrative officers of the university, did not render void the tax voted by the electors of the City.

The burden is on appellants to establish the unconstitutionality of the tax that they assert.

The above is sustained by the holdings of this Court in *Charleston Federal Savings and Loan Ass'n. of Alderson*, supra (ante, p. 5, and cases there cited, page 191 of 324 U. S.).

The Court's Policy of "Strict Necessity" Applies.

It is elementary law that the Supreme Court of the United States follows a policy of strict necessity in disposing of constitutional issues raised for review of a state court judgment. *Rescue Army v. Municipal Court of Los Angeles*, 331 U. S. 549, 67 S. Ct. 1409, 91 L. Ed. 1666. The judicial code (237A) restricts obligatory appellate jurisdiction to a narrow class of cases and forecloses an appeal as of right where there is merely an attack upon a tax assessment or levy. *Memphis National Gas Co. v. Beeler*, 315 U. S. 649, 62 S. Ct. 857, 86 L. Ed. 1090.

This case does not involve the validity of any statute. Furthermore the state court properly held that the levy of the tax did not violate any provision of the Federal Constitution.

For the foregoing reasons it is respectfully submitted that the motion of the named appellees to dismiss, or in the alternative, to affirm, should be sustained.

Respectfully submitted.

Name /s/ William R. King

Address 620 First Natl. Bk., Omaha, Nebraska

Name /s/ Seymour L. Smith

Address 720 Keeline Bldg., Omaha, Nebraska

Members of the Bar of this Court
Attorneys for named appellees.

APPENDIX "A"

Section 14-1317, R. S. of Neb., 1943, Reissue 1962.

"14-1317. Municipal university; tax; limitations; method of increase; power to borrow. (1) The board of regents shall, in the month of July of each year, certify a tax for the support of such municipal university, including the purchase of lands and construction of buildings, the purchase of equipment, and the repairs of the buildings and equipment of such municipal university, and including such amount as shall be necessary for the annual operation of the university for the fiscal year commencing on the first day of January following, not exceeding in any one year one mill on the dollar upon the assessed value of all the taxable property in such city, except intangible property, which levy the president and secretary of such board of regents shall, on or before July 31, certify to the city council, which is hereby authorized and required to cause the same to be levied and to be collected by the treasurer of the city as are other taxes, and paid over by him to the treasurer of such board of regents, subject to the order of said board of regents. If in any year the amount so certified and collected is not needed for the purposes of such university, the balance shall be credited to the sinking fund of such university to be used for additional buildings or other necessary permanent equipment; Provided, that the maximum mill levy may be increased from one mill to not to exceed two mills on the dollar of the assessed value of all the above described property within such city, except intangible property, by a vote of the qualified electors of such city, as provided for by subsection (2) of this section, at any general state or city election, or at a special election called for that purpose; and provided further, that where the qualified electors of such city at any general state or city election have by a majority of those voting in the election voted in favor of increasing such maximum mill levy to two mills on the dollar

upon the assessed value of all the taxable property in such city, except intangible property, and when in any year such total assessed valuation of such city is less than the total valuation used as the basis for taxation in such city in 1952, the board of regents may fix a levy sufficient to produce as much total revenue as was produced by the 1952 levy.

"(2) Notice of the time and place of holding the election, provided for by subsection (1) of this section, shall be given once each week for three successive weeks, the first notice to be given at least thirty days prior to the election in at least one newspaper of general circulation printed and published within such city. The proposition to increase the maximum mill levy may be submitted to the qualified electors upon the affirmative vote of two-thirds of the members of the board of regents, and shall state the maximum mill levy which it proposes to levy annually. If a majority of those voting at the election on the proposition vote in favor of such increased maximum mill levy, then such fact shall be certified to the city council and thereafter the city council shall annually cause to be levied, according to law, such tax as may be certified by the board of regents, but not exceeding the mill levy so voted."

APPENDIX "B"

CERTIFICATION

I, Jerry Hassett, the duly appointed, qualified, and acting Election Commissioner of Douglas County, Nebraska, hereby certify, as follows:

The records in my office show that on May 15, 1951, the following proposition was duly submitted to the qualified electors of the City of Omaha, Nebraska, at a special election, to-wit:

" INCREASE MAXIMUM LEVY FOR UNIVERSITY OF OMAHA

INCREASE IN MAXIMUM AUTHORIZED LEVY FOR THE UNIVERSITY OF OMAHA FROM ONE MILL TO TWO MILLS.

"Shall the maximum annual levy of not to exceed one mill on the dollar of valuation of all personal, mixed and real property within the City of Omaha, which is taxable according to the laws of the State of Nebraska, which levy the Board of Regents of the Municipal University of Omaha is authorized to certify annually to the City Council of the City of Omaha, the same to be levied, and collected by the treasurer of the City and paid over by him to the treasurer of the board of regents, for the support of the University, including the purchase of lands and construction of buildings, the purchase of equipment, and repairs of the building, and equipment of the University, and including such amount as shall be necessary for the annual operation of the University for the fiscal year commencing on the first day of January following, be increased to not to exceed two mills on the dollar of assessed valuation of such taxable property."

YES

NO "

I further certify that the result of such election was, Yes 27,083 : No 25,159

Dated this 18th day of October, 1963.

(Election Commissioner
OFFICIAL SEAL
Douglas County, Nebraska)

/s/ JERRY HASSETT
Election Commissioner
Douglas County, Nebraska

APPENDIX "C"

Section 14-201, R. S. of Neb., 1943, Reissue 1962.

"14-201. City Council members; election; term. In any city of the metropolitan class there shall be elected at large the following officers and none other; Seven Councilmen, whose terms of office shall be three years, who shall constitute the council of said city. The regular or general election for the election of all elective officers of cities of the metropolitan class shall be held on the first Tuesday after the Second Monday in May and every three years thereafter. The term of office of such councilmen shall commence on the second Tuesday after such election."

APPENDIX "D"

Section 14-551, R. S. of Neb., 1943, Reissue 1962.

"14-551. City treasurer; county treasurer is ex officio; bond, amount. The county treasurer of the county in which the metropolitan city is located shall be ex officio city treasurer of such city. As such treasurer of the city, he shall give bond in such amount as may be required of him by the city council, in no event to be less than two hundred thousand dollars conditioned for the faithful discharge of his duties as city treasurer. Such bond shall be signed by at least one surety or guaranty company, to be approved by the city council, and the cost thereof shall be paid by the city. Such bond may be enlarged at any time the city council may deem an enlargement or additional bond necessary. Additional bond shall be likewise signed by a surety company to be approved by the city council, and costs thereof shall be paid by the city."

APPENDIX "E"

Section 14-1318, R. S. of Neb., 1943, Reissue 1962.

"14-1318. Municipal university; treasurer; duties; bond. The treasurer of the county in which said metropolitan city is located shall be ex officio treasurer of the board of regents. He shall prepare and submit to the board, in writing, a monthly report of the state of its finances, receive and receipt for the money collected by the employees of the board, and pay out the same and all other funds of the board only on warrant signed as the board of regents shall by resolution direct. The ex officio treasurer shall give a surety bond payable to the board of regents for the faithful performance of his duties in such amount as the board may deem necessary; the bond to be approved by the board, and the premium thereof paid by the municipal university. Such county shall receive as full compensation for the collection and disbursement of the funds of the municipal university and its board of regents the sum of two thousand dollars per annum, to be paid quarterly by the municipal university; Provided, further that the county treasurer shall receive no additional compensation for the administration of the funds of the municipal university."

APPENDIX "F"

Section 32-308, R. S. of Neb., 1943, Reissue 1960.

"32-308. County officers; when elected. In each county, except as provided in this section, there shall be elected at the general election in 1952 and every fourth year thereafter one county judge; in the year 1954 and every fourth year thereafter, one sheriff, one county treasurer, one county clerk, one county surveyor, one county attorney, and one county superintendent of public instruction, for the term of four years. In each county having a population in excess of two hundred thousand inhabitants, at the general election in the year 1952 and every four years thereafter a register of deeds and a county clerk shall be elected for a term of four years. In each county having a population of more than sixteen thousand five

hundred inhabitants and not more than two hundred thousand inhabitants, to be ascertained by the census of 1950, at the general election in the year 1954 and every four years thereafter a register of deeds shall be elected for a term of four years."

APPENDIX "G"

Section 14-1308, R. S. of Neb., 1943, Reissue 1962.

"14-1308. Board of regents; powers, rules and regulations; tuition. The board of regents so constituted shall have power to prescribe such rules, by-laws, and regulations as may be most expedient for the board and for the government of the municipal university, its faculty, instructors, other empolyees and all students attending the university, subject to the existing laws of the state and of the United States. The board of regents shall also have power to fix reasonable tuition and other charges to be paid by students attending the university, and may, in its discretion, make additional charges to students who are not residents of such city."

APPENDIX "H"

Section 14-117, R. S. of Neb., 1943, Reissue 1962.

"14-117. Corporate limits; how fixed; annexation of cities or villages; limitation; powers and duties of city council. The corporate limits of any city of the metropolitan class shall be fixed and determined by the council of such city by ordinance. The city council of any metropolitan city may at any time extend the corporate limits of such city over any lands, lots, tracts, street or highway, such distance as may be deemed proper in any direction, and may include, annex, merge or consolidate with such metropolitan city, by such extension of its limits, any adjoining city of the first class having less than 10,000 population or any adjoining city of the second class or village; Provided, that any other laws and limitations defining the boundaries of cities or villages or

the increase of area or extension of limits thereof, shall not apply to lots, lands, cities or villages annexed, consolidated or merged under this section. This grant of power shall not be construed as conferring power upon the council to extend the limits of a metropolitan city over any agricultural lands which are rural in character."

APPENDIX "I"

Section 79-1002, R. S. of Neb., 1943, Cum. Supp. 1961.

"79-1002. Property subject to school tax; management of affairs of district; independent district; merger; procedure. All property within the corporate limits of metropolitan cities, except such property as now is or may hereafter be exempt by law, shall be subject to taxation for all school purposes. The affairs of the school district created by Chapter 79 shall be conducted exclusively by the board of education except as otherwise provided by Chapter 79; *Provided*, that any school district in an unincorporated area which maintains a high school *shall, when its area or any part thereof is incorporated into a metropolitan city, remain as a separate and independent district* unless a majority of the legal voters of that district voting on the question vote in favor of merging with such metropolitan school district. Whenever a petition signed by twenty-five per cent of the legal voters in such independent district shall be presented to the board of education of such district requesting that a vote be taken for or against such merger, an election shall be called by the board for that purpose within a reasonable time thereafter which in any event shall exceed six months upon a notice given by the officers of such independent district at least twenty days prior to such election. Such election shall be conducted by the election commissioner of the county and results thereof canvassed and certified by him to the boards of education of the respective districts involved in said merger. In the event that a majority

of the legal voters in such district voting on the question vote in favor of merging with the metropolitan district, the merger shall become effective upon an affirmative vote of a majority of the members of the board of education of the metropolitan school district; Provided, that if a majority of the members of the board of education of the metropolitan school district do not vote in favor of the merger within ninety days after such election, the merger shall not become effective." (Italics supplied.)

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In the
Supreme Court of the United States

October Term, 1963

No. 547

GERALD L. RATIGAN, et al.,

Appellants,

vs.

HERBERT DAVIS, et al.,

Appellees.

On Appeal from the Supreme Court of the State of Nebraska

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE TO AFFIRM JUDGMENT

BENJAMIN M. WALL,
of HANEY, WALSH & WALL,
610 Service Life Building,
Omaha, Nebraska, 68102,
Counsel for Appellants.

Cockle Printing Company—Law Briefs—Omaha, Nebr.

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ARGUMENT

The Allegations of the Petition

Appellees claim that there is no direct assault on the Nebraska statutes, Section 14-1317, R.R.S. Nebraska, 1943, except in the prayer of the petition. In *Standard Reliance Insurance Company v. Schoenthal*, 171 Neb. 490, 106 N. W. 2d 704, cited by the appellees, and immediately

before the quotation excerpted by the appellees, appears this statement by the Nebraska Court:

> "This court has held that a petition containing a prayer for general relief in addition to a prayer for specific relief as in the case before us, entitles the litigant to all the relief the proof shows that he is entitled to receive."

In this instance the plaintiffs-appellants' prayer to their petition is merely a summarization of the allegations of the petition. Certainly the allegations of the petition and the proof control. Here, however, the entire case of the appellants as shown by the petition is that Section 14-1317 is unconstitutional as applied to them.

We point out to the Court that in Paragraph V of appellants' petition in the District Court of Douglas County, Nebraska, the allegation is "That under the provisions of Section 14-1317, R. R. S. Nebraska 1943, the Board of Regents of the Municipal University of Omaha is required to certify and the said Board has certified a tax on all taxable property * * *," and in Paragraph VI of appellants' petition they state: "* * * *that all persons* resident taxpayers in the City of Omaha who happen also to be residents of either School District No. 66 of Douglas County, Nebraska, or School District No. 54 of Douglas County, Nebraska, *are being taxed under the aforesaid provisions of law* * * *." In Paragraph VII of appellants' petition, they allege: "That the levy against plaintiffs' tangible property as established by various defendants for the year 1962 *pursuant to the above and foregoing cited statutes* * * *." In Paragraph IX of the petition wherein the specific allegations of unconstitutionality are set forth, the appellants say: "The assessments of the

taxes *herein referred to* and the attempted collection of the said taxes against the property owned by the plaintiffs and against the property owned by all taxpayers similarly situated is absolutely void, illegal, invalid and unconstitutional for the following reasons and each of them * * *." (Emphasis supplied throughout.)

The prayer then sums all this up by praying that the court determine that "Section 14-1317, R. R. S. Nebraska 1943, is absolutely void, illegal and unenforceable and unconstitutional as applied to these plaintiffs and others similarly situated." No claim has ever been made in this action that the Statute is unconstitutional on its face, but merely that it is unconstitutional as applied to these appellants and others similarly situated, who are being taxed under the provisions of the statute without having a voice in the management and control of the institution which they are taxed to support.

This Court will not search for a Federal question where the Court below has passed upon a Federal question. *Charleston Federal Savings & Loan Association v. Alderson*, 324 U. S. 182, 185, 65 S. Ct. 624, 627. The Supreme Court of the State of Nebraska in its opinion below (p. 16 Jurisdictional Statement) said:

> "Plaintiffs assert that the fixing of the tax to be levied violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States."

Later in the opinion (p. 19 Jurisdictional Statement), the Nebraska Court said:

> "We quite agree, as we have consistently held, that the authority which is required to establish districts, whether they be for election, taxation, or other

governmental purposes, must comply with the uniformity, equality, and due process provisions of the state *and federal* Constitutions. But we have no such problem here, except incidentally. Whether or not the tax levy here made is valid is dependent on entirely different considerations. The first consideration is, of course, that representation is not a condition precedent to the right to tax."

Finally, in its penultimate paragraph, the Supreme Court of the State of Nebraska said:

> "It may be that the Legislature has a function to perform in order to avoid other situations that may arise with reference to constitutional requirements, but under the facts presented in the instant case we find no constitutional provision, *federal* or state, having the effect of voiding the two-mill tax levy on the tangible property within the annexed areas." (Emphasis supplied.)

The Nebraska Court having passed upon a federal question herein involved, there is no necessity for this Court to search for such a question.

The specious claim of the appellees that appellants are represented.

The appellees claim that appellants are represented by being entitled to vote for the County Treasurer and for the City Council, neither of whom have anything whatsoever to do with a discretionary function, and both of whom perform merely ministerial functions under the Act.

Under Section 14-1317, R. R. S. Nebraska 1943, appended to both the Jurisdictional Statement and to Appellees' Motion, the Board of Regents has the discretion to set the tax up to the two-mill maximum levy and to cer-

tify the same to the City Council. Under Section 14-514, R. R. S. Nebraska 1943 (appended hereto as Appendix A), the City Council is given the ministerial function of certifying to the County Clerk the levy certified to it by the Regents. The exact wording of the statute insofar as here material is:

> "In addition to the provisions of subsections (1) and (2) of this section, the city council shall certify to the county clerk in like manner any other levy which may be required by law to be certified by such city council; * * *."

Section 14-514 was last re-enacted by the Nebraska Legislature in 1955. In its 1947 session the Nebraska Legislature passed Section 49-802, R. R. S. Nebraska 1943, which insofar as material herein, provides:

> "Unless such construction would be inconsistent with the manifest intent of the legislature, rules for construction of the statutes of Nebraska hereinafter enacted shall be as follows: (1) When the word 'may' appears, permissive or discretionary action is presumed. When the word 'shall' appears, mandatory or ministerial action is presumed."

Thus, the Omaha City Council, by whom the appellants herein are claimed to be represented in the handling of the levy of this tax, have no discretionary authority whatsoever to determine the amount of the levy or change the amount of the tax or affect it in any way whatsoever, once it is initially certified by the Board of Regents as meeting the tests set forth in Section 14-1317.

Likewise, Section 14-1318, R. R. S. Nebraska, 1943 (App. B, Jurisdictional Statement) confers no discretion upon the treasurer, Appellee Howell. He merely does as directed by the Board of Regents.

The decision in *Thomas v. Gay*, 169 U. S. 264, 18 S. Ct. 340, 42 L. Ed. 740, merely determines that non-residents may be taxed even though they do not have a vote. It does not determine that a tax is valid when it is levied upon a duly qualified resident elector who has been disenfranchised. To the extent that appellees would extend the doctrine announced in *Thomas v. Gay* to conflict with *Gomillion v. Lightfoot*, *Baker v. Carr* and *Gray v. Sanders*, it is apparent that the latter three cases should control in the light of present conditions.

CONCLUSION

In *Baker v. Carr*, 369 U. S. 186, at p. 198, 82 S. Ct. 691, at p. 699, this Court said:

> "Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial."

Appellants herein offer to this Court a most appropriate remedy for total disenfranchisement of any segment of the population. What can more quickly correct a situation of total disenfranchisement than turning off the flow of the funds which enables the officials to maintain themselves in power and to continue the disenfranchisement?

Respectfully submitted,

BENJAMIN M. WALL,
of HANEY, WALSH & WALL,
610 Service Life Building,
Omaha, Nebraska, 68102,
Attorneys for Appellants.

CERTIFICATE OF SERVICE

I, Benjamin M. Wall, one of the attorneys for appellants herein and a member of the Bar of the Supreme Court of the United States, do hereby certify that on November 2, 1963, I served copies of the foregoing Brief in Opposition to Appellees' Motion upon the appellees by depositing the same in a United States mailbox with first class postage prepaid, addressed to Seymour Smith and W. Ross King, counsel of record for the appellees other than the appellee Howell, at 720 Keeline Building and 620 First National Bank Building, Omaha, Nebraska, respectively, and to Francis Pane, counsel of record for the appellee Howell, at the County Courthouse of Douglas County, Omaha, Nebraska.

Benjamin M. Wall

610 Service Life Building,
Omaha, Nebraska, 68102,
Counsel for Appellants.

APPENDIX "A"

14-514. Taxation; annual certification for levy; limits; special purposes; additional levies authorized. (1) The city council shall annually certify to the county clerk of the county in which the city is located, by resolution, the number of mills on the dollar upon the assessed value of all the taxable property in such city, except intangible property, not to exceed fourteen and four-tenths, which the city desires to be levied as taxation for all municipal purposes for the ensuing year; *Provided*, in any such city located in a county containing a duly constituted and functioning health district, the number of mills to be so certified shall not exceed in any one year fourteen and three-tenths. In addition thereto, the council shall certify the number of mills necessary to pay the interest on the bonded indebtedness of the city.

(2) In addition to the number of mills set forth in subsection (1) of this section, the council shall also and further certify not less than four additional mills and such number of mills as may be necessary to pay bond issues maturing within the year or bond issues maturing in the near future, the object of this requirement being to create a fund to accomplish a partial retirement of the bonded obligations of the city in such a manner as to avoid unusual and heavy levies during particular years when large maturities occur.

(3) The proceeds derived from the respective levies provided for in subsections (1), (2), and (4) of this section shall be devoted exclusively and entirely to the purposes for which the levy is made. The certification, provided for under subsections (1), (2), and (4) of this sec-

tion, shall be made before the county board of equalization shall have made its tax levy for each respective year.

(4) In addition to the provisions of subsections (1) and (2) of this section, the city council shall certify to the county clerk in like manner any other levy which may be required by law to be certified by such city council; *Provided,* that a further appropriation not to exceed one-fourth mill on the dollar upon the assessed value of all the taxable property, in such city, except intangible property, may also be levied for the purpose of establishing a recreation fund to be used for the purchase, establishment, management, equipment, and maintenance of playgrounds and recreation centers, including the construction of necessary buildings therefor. Such recreation fund shall be disbursed under the direction and supervision of the local governing body of said city in conjunction with the local governing body of any other governmental subdivision wholly or partially within its corporate limits when a plan has been submitted and approved by the electors, as hereinafter provided. If the school district, situated wholly or partially within such city, submits a plan and makes a levy for a similar purpose, said city shall not submit a plan or proposal for such a levy as long as said plan is in operation. No levy shall be made for such recreation fund purposes unless the proposition to make such levy and the plan to dispose of such fund be sanctioned by sixty per cent or more of the legal voters of the city either by petition signed by them or by sixty per cent or more of the votes cast on the proposal submitted on ballot at a general municipal election.